NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.

NATIONAL RIGHT TO WORK COMMITTEE

September 3, 2008

VIA FAX AND E-MAIL

Ms. Mary L. Johnson, General Counsel
National Mediation Board
Washington, D.C. 20572

Re: Comments on the National Mediation Board's Proposed Revisions to its Representational Manual (July 15, 2008; revised July 31, 2008)

Dear Ms. Johnson:

These comments are submitted for the National Right to Work Committee and National Right to Work Legal Defense and Education Foundation, Inc., in response to the above referenced Proposed Revisions to the National Mediation Board's Representational Manual.

I. National Right to Work Is an Expert on Matters Concerning Employee Free Choice.

The Committee is a coalition of 2.2 million Americans united by one belief: No one should be forced to pay tribute to a union to get or keep a job. These citizens agree that federal labor law should not promote coercive union power. They support the enactment of federal legislation and state Right to Work laws to eliminate all sanction for compulsory unionism.

The Foundation is a nonprofit, charitable organization that provides free legal aid to individual employees who, due to compulsory unionism, suffer violations of their Right to Work; freedoms of association, speech, and religion; right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the states. Since its founding in 1968, the Foundation has provided legal assistance in all United States Supreme Court cases involving employees' right to refrain from joining or supporting a labor organization as a condition of employment, including Davenport v. Washington Education Ass'n, 127 S. Ct. 2372 (2007); Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Communications Workers v. Beck, 487 U.S. 735 (1988); Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292 (1986); Ellis v. Railway Clerks, 466 U.S. 435 (1984); and Abood v. Detroit Board of Education, 431 U.S. 209 (1977). Many cases the Foundation's litigation program has supported directly concern the NMB's procedures and/or employees' right to refrain under the Railway Labor Act. E.g., Ellis; Miller; Russell v. NMB, 714 F.2d 1332 (5th Cir. 1983); Masiello v. U.S. Airways, Inc., 113 F. Supp. 2d 870 (W.D.N.C. 2000); Dean v. Trans World Airlines, Inc., 924 F.2d 805 (9th Cir. 1991).

More recently, the Foundation's litigation program has been at the forefront of exposing the true purpose of so-called "card check" programs: to deny employees an uncoerced choice regarding unionization. See, e.g., Dana Corp., 341 N.L.R.B. 1283 (2004), further proceedings, 351 N.L.R.B. No. 28 (2007); Patterson v. Heartland Indus. Partners, LLP, 225 F.R.D. 204 (N.D. Ohio 2004); Heartland Indus. Partners, 348 N.L.R.B. No. 72 (2006); see also "'Neutrality Agreements' and the Destruction of Employees' Section 7 Rights," ENGAGE, May 2005, at 101. Thus, the Committee and Foundation have an interest in the Proposed Revisions of the NMB's Representational Manual. This interest is heightened by the NMB's pointed "clarification" that "nothing in the Board's proposed Section 19.701 is intended to interfere with or preclude either certification by card check pursuant to Manual Section 7.0 or voluntary recognition." (Notice dated July 31, 2008).

As outlined below, "card checks" are conducted in an atmosphere of union coercion and harassment and are inherently suspect. Rather than promoting or allowing "card checks," the NMB should follow the lead of the National Labor Relations Board in Dana Corp., 351 N.L.R.B. No. 28 (2007), and recognize that "card checks" are grossly inferior to a traditional secret-ballot method of choosing or rejecting a union. The NMB has the power under 45 U.S.C. § 152, Ninth, to mandate use of secret-ballot elections, and it should do so. This is especially necessary given the fact that, even when a secret-ballot election is conducted, all employees can be forced to accept a union as their monopoly representative even though only a bare majority has agreed to such representation. Because forced representation severely curtails dissenting employees' freedoms of speech, association and contract, the NMB must ensure that the most stringent procedural safeguards are in place before such infringement is allowed to occur.

II. All NMB Rules and Policies Should Discourage or Disallow "Card Checks."

According to the NMB's Clarification of its Proposed Revisions (dated July 31, 2008), the revised rules will state that "nothing in the Board's proposed Section 19.701 is intended to interfere with or preclude either certification by card check pursuant to Manual Section 7.0 or voluntary recognition." But rules allowing "card checks" undermine employee free choice and violate the letter and the spirit of the RLA, which protects employees' "complete independence" in matters of "self-organization." 45 U.S.C. § 151a. "Card checks" are designed not to protect employees' right to freely choose or reject unionization, but to subvert it.

As the NLRB noted in Dana Corp., in applying the analogous NLRA:

> While . . . the Act permits the exercise of employee free choice concerning union representation through the voluntary recognition process, this does not require that Board policy in representation case proceedings must treat the majority card showings the same as the choice expressed in Board elections. On the contrary, both the Board and courts have long recognized that the freedom of choice guaranteed employees . . . is better

> realized by a secret election than a card check. "[S]ecret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority support." . . . Our administration of the Act should similarly reflect that preference by encouraging the initial resort to Board elections to resolve questions concerning representation.

351 N.L.R.B. No. 28, at 6-7 (citations & footnotes omitted).

In Dana Corp., the NLRB gave several reasons why secret-ballot elections should be encouraged and "card checks" discouraged. Those same factors apply to the NMB and the RLA:

> First, unlike votes cast in privacy by secret Board election ballots, card signings are public actions, susceptible to group pressure exerted at the moment of choice. The election is held under the watchful eye of a neutral Board agent and observers from the parties. A card signing has none of these protections. There is good reason to question whether card signings in such circumstances accurately reflect employees' true choice concerning union representation. "Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election)."
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> Second, union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options. As to the former, misrepresentations about the purpose for which the card will be used may go unchecked in the voluntary recognition process. Even if no misrepresentations are made, employees may not have the same degree of information about the pros and cons of unionization that they would in a contested Board election, particularly if an employer has pledged neutrality during the card-solicitation process. Employees uninterested in, or opposed to, union representation may not even understand the consequences of voluntary recognition until after it has been extended. . . .
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> Third, like a political election, a Board election presents a clear picture of employee voter preference at a single moment. On the other hand, card signings take place over a protracted period of time. In the present Metaldyne cases, for instance, the Union took over a year to collect the cards supporting its claim of majority support. During such an extended period, employees can and do change their minds about union representation.

Id. at 7-8 (citations and footnotes omitted). All of these factors apply equally under the RLA, because all "card checks," regardless of the statute, are conducted in public under the watchful eyes of union officials, agents, and organizers.

In secret-ballot elections, the federal agency is supposed to provide a "laboratory" in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. See General Shoe Corp.,77 N.L.R.B. 124, 127 (1948); NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory–indeed the preferred–method of ascertaining whether a union has majority support"); Brooks v. NLRB, 348 U.S. 96, 99 (1954) ("an election is a solemn and costly occasion, conducted under safeguards to voluntary choice"). In contrast, the fundamental purpose and effect of a "card check" is to *eliminate* federally-supervised "laboratory conditions" protecting employee free choice, and substitute a system in which union officials have far greater leeway to pressure employees to accept the union as their monopoly bargaining representative.

Indeed, the contrast between the rules governing an agency supervised secret-ballot election and the "rule of the jungle" governing "card checks" could not be more stark. For example, in an NLRB-supervised secret-ballot election, the following conduct has been held to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring the invalidation of the election: (a) electioneering activities, or even prolonged conversations with prospective voters, at or near the polling place;[1] (b) speech-making by a union or employer to massed groups or captive audiences within 24 hours of the election;[2] and (c) a union or employer keeping its own list of employees who vote as they enter the polling place.[3]

Yet, most of this objectionable conduct occurs in every "card check" campaign. When an employee signs (or refuses to sign) a union authorization card, he is not alone. To the contrary, this decision is likely to be made in the presence of one or more union organizers soliciting the employee to sign a card, and thereby "vote" for the union. This solicitation often occurs during or immediately after a union mass meeting. In all cases, the employee's decision is not secret, as in an election, because the union hierarchy has a list of who has signed a card and who has not. Once an employee has made the decision "yea or nay" by voting in a secret-ballot election, the process is at an end, and no one knows how the employee voted. By contrast, a choice against signing a union authorization card is known by the union and does not end the decision-making process for an employee in the maw of a "card check drive," but often represents only the beginning of harassment and intimidation for that employee.

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[1] See Alliance Ware, Inc., 92 N.L.R.B. 55 (1950) (electioneering activities at the polling place); Claussen Baking Co., 134 N.L.R.B. 111 (1961) (same); Bio-Medical Applications, 269 N.L.R.B. 827 (1984) (electioneering among the lines of employees waiting to vote); Pepsi Bottling Co., 291 N.L.R.B. 578 (1988) (same).

[2] Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

[3] Piggly-Wiggly, 168 N.L.R.B. 792 (1967).

A recent NLRB decision demonstrates that conduct inherent in *all* card check drives would be objectionable and coercive if done during a secret-ballot election. In Fessler & Bowman, Inc., 341 N.L.R.B. 932 (2004), the NLRB announced a prophylactic rule that prohibits union officials from performing the ministerial task of handling a sealed secret ballot that was to be mailed to the NLRB – even absent a showing of tampering – because, where "ballots come into the possession of a party to the election, the secrecy of the ballot and the integrity of the election process are called into question." Id. at 933.

But, in union "card check" campaigns, the union officials do much more than merely handle an authorization card as a matter of convenience to the employees. In these cases, union officials directly solicit the employees to sign the card (and thereby cast their "vote"), stand over them as they "vote," know with certainty how each individual employee "votes," and then physically collect, handle and tabulate these purported "votes." The coercion inherent in this conduct is much greater than the theoretical taint found in Fessler & Bowman.

In short, all "card check" procedures fail to provide the "laboratory conditions" guaranteed in an agency-supervised election. The superiority of such supervised secret-ballot elections is beyond dispute, because "card checks" and "voluntary recognitions" inherently lack integrity. The NMB's rules should state this explicitly, and not blithely allow or encourage "card checks." Indeed, the NMB has the statutory authority under 45 U.S.C. § 152, Ninth to mandate secret-ballot elections, and it should do so. This is especially true given the fact that even when a secret-ballot election is conducted, all employees can be forced to accept the union as their monopoly representative even though only a bare majority has agreed to such representation. Because this forced representation severely curtails the dissenting employees' freedoms of speech, association and contract, the NMB must ensure that the most stringent procedural safeguards are in place before such infringement is allowed to occur.

Conclusion: The Committee and the Foundation believe that all NMB rules, regulations and policies should mandate the secret-ballot election process and entirely forbid "card checks" and "voluntary recognitions."

Sincerely yours,

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